J. S. Chapman.

No. 671.

IN THE

CIRCUIT COURT OF THE UNITED STATES,

NINTH CIRCUIT,

SOUTHERN DISTRICT OF CALIFORNIA.

CHARLES D. LANNING, Receiver, Etc.

Complainant,

vs.

H. C. OSBORN, Et Al.,

Defendants.

Defendants' Brief on Exception to Answer.

WARD & HAINES,
Of Counsel for Defendants.

No .....

IN THE

CIRCUIT COURT

OF THE

UNITED STATES,

NINTH CIRCUIT, SOUTHERN DISTRICT OF CALIFORNIA.

CHARLES D. LANNING, Receiver, Etc.
Complainant,

vs.

H. C. OSBORN, ET AL.,
Defendants.

DEFENDANTS' BRIEF ON EXCEPTION TO ANSWER.

It is the avowed purpose of the solicitors for complainant, to raise upon the exceptions to the answer, virtually all the questions of law in the case.

The effort has been to make the answer conform as closely as may be to the facts; and the decision upon the exceptions will be largely and perhaps wholly decisive of the cause.

It is sufficient merely to advert to the rules governing exceptions of this character as laid down in Daniel's Ch. Prac. (Perkins' Ed.).

1. "The Court, in cases of impertinence, ought be-
"fore expunging the matter alleged to be impertinent,

" to be especially clear, that it is such as ought to be " struck out of the record, for the reason that the error " on one side is irremediable, on the other not." Pages 769, 359 note.

2. " An exception for impertinence must be sup- " ported *in toto*, or it will fail altogether." Ibid, p. 769.

3. " If the matter of an answer is relevant, that is, " if it can have any influence whatever in the decision " of the suit in reference to any point to be considered " in it, it is not impertinent." Ibid, 769 citing.

Tucker vs. *Cheshire R. R. Co.*, 1 Foster (N. H.) 38, 39.
Van Rensselaer vs. *Bruce*, 4 Paige, 177.
Hawley vs. *Wolverton*, 5 Paige, 522.

I.

These rules and especially the second seem to show that the exception " First " numbering 47 paragraphs and the exception " Seventh " cannot be supported.

II.

The exception " Second " is a pure misapprehension of the theory upon which one class of the defendants have pleaded the purchase from the company of lands with the appurtenant easements in its diverting and distributing system ; and upon which another class of defendants, not purchasers of land from the company, have bought easements under the form of contract set forth on pages 17 and 18 of the bill.

They have not pleaded the facts in this connection, to show return to the company of " a part of its princi- " pal invested in its said water works and *that therefore* " *they should not be required to pay rates upon a basis of* " *allowing to said company any interest on the amount so* " *advanced or returned to it*," as assumed by the exception.

Neither of them can fairly be accused of having had the fatuous intention to contribute the money so paid, be it much or little, for the general relief of all who had come, and all who might come under the system equally with himself, from the obligation to pay interest "on the amount so advanced or returned to it." Purchasers of land under irrigation from the company might as well be accused of having paid the large prices of from $300 to $500 per acre, in order to make the prices of land lower to all who might buy afterwards. Whether servitudes upon the diverting and distributing works can be so sold and made appurtenant, is a most important question in this case, which we shall consider further on.

But we ask absolution from the charge that the prices paid for such attempted purchases, were intended to be contributed to the whole community.

III.

It will be convenient to consider exceptions "Third," "Fourth," "Fifth" and "Sixth" after a general consideration of the exceptions grouped in the "First".

IV.

However defective in form the "First" exception may be, it suggests questions of fundamental importance to the irrigation interests of this State. And it is not too much to say, that the growth of the community whose natural, most convenient, and, at present, only water supply, is under the control of the complainant receiver, is at a stand-still, until a proper solution of these questions is judicially given. And the same is

true of the San Diego Land & Town Company itself, since it is the largest land owner and dealer in land, under the system.

Since this corporation is now being administered through a receiver, there is a peculiar, and no light responsibility thrown upon the Court, in calling upon it to settle the legal principles which should govern the corporation in the relation of the lands it has sold and has to sell, to the water supply for irrigation which it administers; and also, the principles which govern the relation of the water supply to other lands, already supplied by it with water and those which may demand water.

A most striking phase of the superficial aspect of the controversy is the extreme anxiety of the corporation (for the receiver is an officer of the corporation and entirely identified with its plans and purposes) to get away from its contracts and take shelter under the Constitution and statute of 1885; and a corresponding dread on the part of the consumers to admit that they have come in respect of the water supply, under absolute public regulation, as the corporation contends. Thus there is a reversal of what one would suppose to be the natural order of things. It has been supposed that Art. 14 of the Constitution was adopted, and, that the statutes pursuant to it were enacted, for the protection of the individual consumer; but we have the remarkable spectacle, of seeing him flee from his supposed defences; and, of the corporation pressing hotly in to occupy them.

The corporation says, "we are content to be circumscribed by the Constitution and the laws; let them

" be the only breath to our nostrils, the only mode of " our existence, the sole galvanizer of our functions."

It declares that it has no capacity to bind itself by contract; " the Constitution and law," it says, " manage " the the whole thing excellently well, to our liking."

The consumer says, "for Heaven's sake, leave us " some autonomy; do not compel us to commit all " power to the board of supervisors to fix the value of " our property and the terms on which we shall enjoy " it. Let us have such protection as we can get by our " contracts, fairly made, and honestly kept."

" Not so," says the corporation. "Go you to the board " of supervisors. You shall be driven to the board; " for the statute gives us the power to raise the rates " without limit; your only resource is to the board, " and not to the courts; and we have doubled the rates " on you to drive you to the board. We are content " with net revenue anywhere between 6 and 18 per " cent., which the board must allow, based on such evi- " dence as we control, after payment of such expenses " as we have the making of, not omitting salaries. Get " you hence to the board."

Is not this the naked plot of the comedy now on rehearsal before the Court?

What else means the assertion for complainant, that the Constitution and statute law have taken away from corporations and consumers all power and capacity to fix or regulate their relations by contract; that the statute vests in the corporation the power to raise rates whenever it pleases; which asserts in the language of the fifth exception, " that the *defendants have no stand-* " *ing in the Court to contest the reasonableness of said* " *rates, but their remedy, if any they have, is to apply to* " *the Board of Supervisors of the county in which their* " *land is situated to fix and establish rates.*"

We do not deprecate the putting of limitations on the public control, where the consumer resorts to it.

But to compel him to accept such control, unlimited by his supposed contract rights, under the duress of a water famine deliberately caused by complainant, as boldly avowed in his bill, is another thing altogether.

It is not out of place to advert to more general considerations which mark whither we are tending. San Diego county is but an illustration of what is going on in the whole of Southern California. Numberless water corporations have in some form or other seized upon every reservoir site, and are scrambling over each other for control of every stream and rivulet in the county. The posting and recording of notices of appropriation of water is a regular and unremitting industry, in anticipation of the time when works can be constructed, or profitable sales made to other corporations, private or public.

The control of the whole water supply is surely gravitating into the hands of the corporations, and necessarily so; and under the application of proper principles, beneficently so; for consumers of water, cannot, each for himself, divert the water and construct water works.

But if it be established—if it could be established—as the other side now contends, that no land owner can acquire and protect interests in the water system by contracts with such corporations; that the whole matter of net revenue (as distinguished from the expenses of maintenance and operation) must remain an annually recurring question, which may be precipitated at pleasure by the corporation by raising the rates; that the only refuge of the consumer is to the board of supervisors; and that it is against their decision alone that he

may appeal to the courts; if that be true, then the consumer is in an infinitely worse plight than he was before the Art. XIV was adopted.

For if it be the law that no person can protect himself by contract in relation to supplying himself with water; that, on his part, it is all left to the board of supervisors; then that body is vested with a power that is absolutely startling. Let all the corporations that control the whole water supply, concentrate their attention upon the fact—if it can be established to be the fact—that the board has delegated to it, this power; that the corporation can call this power into exercise at its pleasure (though the right so to do is, in form, denied to it by statute) by the simple means pursued here, as set forth in the bill; and we need no prophecy to foretell the result. The office of supervisor will be, in the pecuniary sense, a valuable, as well as a powerful one. The greater element of the value of every irrigated tract will be constantly in the state of flux, practically at the mercy of the company on the one side, and of the board on the other, subject to frequent costly appeals to the courts; it will also perforce be in politics, and subject to the vicissitudes of political manipulation, with the most tremendous odds in favor of the corporations; for they will have nothing to lose, in view of the net guaranty by the public power of a safe minimum rate of interest, and everything up to 18 per cent. above that to gain.

The whole scheme as here urged, is virtually to extend the power of taxation in a new and subtle form; to lead up to fuller demonstration of Marshall's declaration, that "the power to tax is the power to destroy."

It is putting in practice the political philosophy of absolute government, without the administrative safeguards of which that form admits, and ours does not. It is the worst form of paternalism, coming home directly to every acre, taking the business of the people out of their own hands and vesting it in officials. The attempt made in this case, is a concrete illustration of the socialistic dream of all people managing each body's business, sought to be forced upon the individual for the advantage of a corporation, as literally an *imperium in imperio*. We have made these observations to emphasize the expression of the great importance of the questions actually before the Court.

V.

Its "Articles of Association" show that the corporation was organized among other purposes for "the "construction and maintenance of dams and canals for "the purpose of water works, irrigation or manufactur- "ing purposes; for the purchase and sale of real estate "for the benefit of its members; the purchase, location "and laying out of town sites and the sale and convey- "ance of the same in lots or subdivisions or otherwise; "the promotion of immigration; the encouragement of "agriculture and horticulture," as well as "the supply "of water for the public." (Answer p. 3)

The answer avers that the corporation is an appropriator of water under the statutes of California and the Acts of Congress, of the water of Sweetwater river, both for sale, rental and distribution, and for the irrigation of its own lands, while it shall continue to own them and after it has disposed of them, and for enabling the corporation to sell and dispose of its lands as irrigated lands, and to supply the needs of the people who

should purchase its lands and settle on them (pp. 3-4).

It thus appears that the water diverted and led by the company's works was such as was open to appropriation, and therefore so far forth, water flowing from the public lands of the State and the United States.

And in this connection is a fact overlooked in drafting the answer, that the San Diego Land & Town Company is the grantee of all the riparian water rights in the Sweetwater river for the National Ranch, under a grant reaching back by *mesne* conveyances to 1869. The Sweetwater river has its mouth in the National Ranch on San Diego Bay, and enters the ranch some distance above the breast-work of the dam, and some seven miles above its mouth.

For a history of these riparian water rights see *Doyle* vs. *San Diego Land & Town Co.*, 46 Fed. Rep., 709, a case in this Court. The corporation was also in 1887 a large riparian owner on the Sweetwater river, and so far as it has not sold its lands, still remains such owner.

It would seem that under these facts (as to which, so far as material and not already pleaded, leave will be asked to perfect the answer) the corporation, so far as the water supply was brought upon its own lands became the owner of both land and water in one estate. It built its dam and pipe system as set forth in the answer, and threaded its own land with a net-work of pipes filled with water. So long as there was and is no severance of title to any of its land, it seems clear that the company had and has no relation to its water supply derived from appropriation for use on its own lands and from the grant to it of riparian rights, which was or is

subject to public regulation—unless it was and is, the apportionment of the cost of the maintenance and operation of its works as between it and outside land owners using the system; there was and is no occasion, and no room, to fix by public authority an annual rate of *net revenue*, which it should pay to itself for use of its own water works.

McFadden vs. *Board of Supervisors*, 74 Cal., 571.

When it sold and conveyed parcels of its lands to certain of these defendants, unless the grants contained an express reservation of that portion of the corporeal estate which consisted of the water supply led upon the land, such supply passed with the land. Upon familiar principles, so much of the pipes as lay within the boundaries of the granted land, passed with the fee and in fee; and as to the reservoir and so much of the conduit as led up to and lay outside the boundary of such land, upon the severance, there sprang up a relation of servient estate to the land granted, as the dominant estate; in other words, the servitude upon the water system, so far as such system was not actually within the land granted, passed by the grant as an appurtenant easement; and it passed without express mention, and even without the use of the term "appurtenant" in the deed.

Cave vs. *Crafts*, 53 Cal., 135.
Farmer vs. *Ukiah Water Co.*, 56 Cal., 11.
Fitzell vs. *Leaky*, 72 Cal., 477.
Standart vs. *Round Valley Water Co.*, 77 Cal., 399.
Coonradt vs. *Hill*, 79 Cal., 587.

McShane vs. *Carter*, 80 Cal., 310.
Crooker vs. *Benton*, 95 Cal., 365.
Clyne vs. *Benecia Water Co.*, 100 Cal., 310, 314.
Tucker vs. *Jones*, (Mont.) 19 Pac. Rep., 571.
Sweetland vs. *Olsen*, (Mont.) 27 Pac. Rep., 339.
Taylor vs. *Nostrand*, 31 N. E., 245, 246.
Simmons vs. *Winters*, (Or.) 27 Pac. Rep., 8, 10.
Hindman vs. *Rizor*, (Or.) 27 Pac. Rep., 13.

"No one can acquire an easement in his own estate. "But in the absence of an express grant of such right "from another, an easement in water may arise; first, "by prescription; second, upon severance of tene- "ment."

Gould on Waters, Sec. 327.
Wash. on Easements and Serv., (3 ed.) p. 25.

But it is also laid down that, "the interest of an ease- "ment may be a freehold or a chattel (leasehold) one, "according to its duration." Wash. E. & S., p. 6.

Are the easements of the defendants who are grantees of the company, freehold or leasehold?

Sec. 519 of Gould on Waters lays down the rule: "A "conveyance of water rights should be construed in "the light of preliminary agreements and circum- "stances rendering the purpose of the parties plain," citing:

Woodcock vs. *Estey*, 43 Vt., 515.
Jennison vs. *Walker*, 11 Gray, 423.

Under all the circumstances set forth in the answer, especially the payment of the prices for the land as irrigated land, and that for more than five years the company has treated such lands on the same footing, as to rates, as its own, we do not hesitate to say, that the grants of the appurtenant easements, are freehold. And

this accords with the perpetual easement declared under such circumstances by Sec. 552, Civil Code.

This also accords with the unqualified averment in the bill, that each such defendants have, "by purchase "become the *owner* of a water right to a part of the "water appropriated and stored by said company, ne- "cessary to irrigate his tract of land;" it also accords with the like explicit admissions and assertions in the answer.

"It is in the nature of servitude not to constrain "any one to do, but to suffer something, *ut aliquid pa- "tiatur aut non faciat.*" Wash. E. & S., p. 5.

Yet, "In case of servitude, the *jus in rem* may hap- "pen to be combined with the *jus in personam* against "the owner; and so may happen to be combined with "a right to an act against the owner—*e. g.*, a right to "have a way repaired by the owner." Austin's Jurisprudence, Sec. 1071.

The personal duty of the corporation after having granted the servitudes in its system as appurtenant easements to land sold by it, is to manage, maintain and operate its system. For the source of this obligation, we may, in all branches of this case, look to the clause in its corporate franchise investing it with the power, and therefore the duty, of the "maintenance "of dams and canals for the purpose of water works, "irrigation, etc.," and the general incidental powers recited at the close of the extract from its articles set forth in the answer (p. 3). This is also consistent with its contract to continue the "duty" of the system; and with its duty to serve the beneficial use so long as it diverts water dedicated by the Constitution and principles underlying law of appropriation, to the public use.

Reference is made to the distinction between the *jus*

in rem, being the servitude proper, and the *jus in per sonam*, being the right to have the company maintain and operate the system, to point out that they have no necessary connection; that the price of the servitude may be paid once for all; while the compensation for the continuing maintenance and operation may, indeed must, go on indefinitely.

Booth vs. *Chapman*, 59 Cal., 149.

It seems to us that the facts pleaded in the answer show not only that the company's grantees have freehold servitudes, but that they have paid the whole price for them. From this it results that there is neither justice, equity, nor anywhere the power, to compel them to pay for the same thing again by way of annual rate. As to these lands the element of net revenue is for all time eliminated from the rates; the appurtenant "water rights" are paid for, forever.

All this is applicable to the cases of the defendants who purchased this irrigated land and took conveyances which made no express mention of their water rights. These all purchased under the express representation, with respect to the compensation for its personal obligation to maintain and operate the system, that is to keep the servitude in order, that the company's charge should be $3.50 per acre per annum. No equitable reason appears in this case why that rate should be superseded: for up to January, 1894, with only a fraction of the system employed, it yielded a net surplus of $49,699.28 (Answer, p. 26). From the bill and answer it appears that annual expense of maintenance and operation does not exceed $12,034.99 (Bill, pp. 5, 6,

Answer, p. 23). The gross collections amount to not less than $25,715 per annum, according to the Bill (pp. 5, 6) and will be for 1896 not less than $27,000, according to the Answer (p. 24).

The same legal conception of dominant and servient estate is applicable to the express contracts under which the company sold land and "water rights" after December, 1892. (See form of contract, Answer p. 15).

The only interpretation that contract will bear, is that it covers the sale of land with the freehold servitude on the water system annexed as appurtenant, for one price to be paid in *solido;* and that it contains the additional, separate and distinct covenant of the company, that the acre foot of water per annum shall "be "delivered by the party of the first part through its "pipes and flumes."

This latter is no more than a covenant that the diverting, storing and carrying capacity of the servient estate shall be continuously maintained and like continuous compensation be made in rates for such maintenance. It is the precise case of a pure freehold servitude, *plus* a personal obligation to keep it in repair, as described by Austin in the extract above quoted.

The same thing is true, *mutando mutandis*, as respects the contracts with owners of lands not bought of the company (Ans. pp. 18, 19); They comprise the sale of the servitude proper for its separate price, and also contains separate and distinct covenants to maintain in operation, for which, and for which alone, rates are to be paid. In each the servitude is paid for at prices fixed; the future maintenance is to be met by an annual rate.

Contracts of the latter class were enforced by the Supreme Court of this State in *Fresno Canal Co.* vs. *Rowell*, 80 Cal., 114; and in *Fresno Canal Co.* vs. *Dunbar*, 80 Cal., 530.

In the latter case it said (p. 535): "It was provided "that the right to the water to be furnished by the re- "spondent, should *be and become appurtenant to the land*, "and this was followed by an express agreement that the "contract to pay the money therefor should bind the "land. This, we think, created a lien on the land," etc.

The internal evidence is, that the express contracts here in question, were framed upon the precedent of those there enforced.

See also *Clyne* vs. *Benicia Water Co.*, 100 Cal., 310; for illustration of the creation of a "water right" as an appurtenant to land.

As respects those defendants who did not buy land of the corporation and who did not take written contracts for the easement of "the flow and use of water;" but who prior to December, 1892, fell into and now remain in that class of persons who "have been furnished water by it with which to irrigate their lands," under Sec. 552 of the Civil Code, we submit it must be held, that the statute executes the conveyance to them of servitudes on the system, as an appurtenant to their land, somewhat as the statute of uses executed the use by vesting the legal estate in the person in whose favor the use was declared or implied. This statute is not, in our judgment, to be construed as *compelling* a corporation to annex the "continued use of said water" to the land of such person for the same nominal annual rate as to the lands of those who have purchased of the corporation; that is to say, in disregard of the fact that

the company built the system, and the outsider not, for this would be confiscation.

But its intent is, to declare that in all cases where the corporation has voluntarily elected to furnish, and has begun to furnish water to lands not sold by it, on the same terms as to lands sold by it, and when upon the strength of this, the owner has improved and cultivated such land; that under such facts it does not require the lapse of five years to create the servitude by prescription; but such servitude arises directly and the statute operates to make the conveyance. It confers on the corporation the capacity to grant an easement by doing the act prescribed, as fully as it could by deed of grant.

Smith vs. *Green*, 109 Cal., 228, 234-5.

But in addition to all this the answer shows (pp. 28, 32) that the defendants in this class have been more than five years in the use and enjoyment of their easements, as of right; and aside from Sec. 552, in such cases, the law presumes after the lapse of five years, that a legal conveyance was made.

"It would seem that a title acquired by prescription is as strong as a title acquired by grant." Gould on Waters, Sec. 531.

Clyne vs. *Benicia Water Co.*, 100 Cal., 310.
Faulkner vs. *Rondoni*, 104 Cal., 140, 146.
Joseph vs. *Ager*, 108 Cal., 517.
Smith vs. *Green*, 109 Cal., 228, 235.

If "the use of the way, is under a parol consent "given by the owner of the servient tenement to use it "as if it were legally conveyed, it is a use of right. So

" an occupation of land under a parol gift from the " owner is an occupant as of right * * * In " such cases the law presumes, after the lapse of twenty " years, that a legal conveyance was made."

Stearns vs. *Allen*, 12 Allen, 582.

The bill of complaint avers that this class of defendants are *owners* of their water right, and makes no discrimination in the quality of their rights from those which it concedes to the other defendants; it makes no claim in this suit against this class of defendants to any different annual rate from that demanded of the other defendants. The corporation never has established any differential rate for this class from the first operation of its system in February, 1888, down to the present time. It has a standing rule (pages 19 and 20 of answer) by which, for the purpose of fixing rates for irrigating acre property, the lands are divided into two classes as follows:

" All lands to which the easement and flow of water " for irrigation has been or shall be annexed by the " consent or voluntary act of this company shall con- " stitute *the first class.*"

" All lands to which the easement and flow of water " for irrigation has not been or shall not be annexed " by the consent or voluntary act of this company shall " constitute *the second class.*"

The rule further provides that in addition to the annual rate (which is the same for both classes), that " there shall be paid upon the lands of said " class an annual charge equal to six (6) per " centum of the value of the right to said easement " and flow of water for irrigation which said value is to " be taken as $100 per acre."

This rule explicitly classes the easements of all

these defendants as being freeholds; and it provides a rate for such other would-be consumers as may not desire to contract for an easement in freehold; but shall desire the easement of the flow of the water in leasehold; and accordingly, the rule reserves rent for the use of such leasehold easement.

It would be hardly possible to bring the legal definition of the rights of all these defendants, by the company and their receiver more fully, than is done by this rule, within the first class of grants of a water course in law, defined by Jessel, M. R., as quoted by this Court in 46 Fed. Rep., 709, in these words: "The easement or the right to the running of water."

We desire to point out that in adopting this rule tenth, the corporation and receiver have followed the very distinction taken by Sec. 5 of the Act of 1885, which expressly authorizes the board of supervisors in fixing maximum prices, to discriminate between the sale and rental of water. We shall comment on this further on, in the endeavor to show that what the statute should be interpreted to mean is the sale or rental of the right to the flow of the water through its system and not the sale or rental of the water itself.

It is sufficient here to say, that the construction which the company has put upon the "water right" conceded in the bill to all the defendants equally, in all its sales, contracts, practice, rules and collection of rents, from the beginning of its water service, has been and still is, that such rights were, one and all, freehold servitudes on its system annexed as easements to the respective tracts of land; and this is the express provision of Sec. 552 in view of the facts in this case.

This being so, it is manifest that the claim of any legal or equitable right to any net income by way of rates to yield interest on the cost or value of the system is absolutely inadmissible—as much an attempted violation of vested rights, as to charge interest on the value of the land the company has been paid for and has deeded in fee.

And it being further true, that the $3.50 rate per acre per annum together with the domestic rates, yield even now, twice the annual expense of management, maintenance and operation, there is no color of right or equity for the attempted increase of rates to $7.00.

But in addition to this, is the fact of express representations by the company, to induce the purchase of its lands—at prices which it is self evident were for lands under irrigation—that the rates should be $3.50 per acre per annum, ripened into contracts by the acceptance on the part of its purchasers; and the fact of the establishment of this rate, by which others were induced to settle upon and improve lands not sold by the company.

Again as shown by the answer (pp. 31, 32) the $3.50 rate has been established for more than eight years, and for more than five years has been exacted from the defendants and their privies in title for maintaining and operating the system (pp. 31, 32, answer). It is alleged that this rate is in itself a servitude of toll, or rental by prescription on their lands, and therefore cannot be increased in burden by the corporation.

Civil Code, Sec. 802, Subdiv. 4; Sec. 811, Subdiv. 4; Sec. 1007; Statute of 1862, pp. 541-2, Sec. 5, which is the precursor of the Statute of 1885 and deals with

"rates, water rents or tolls." The term "tolls" was used by McKinstry J. in *Price* vs. *Riverside*, 56 Cal., 421-3, as synonymous with water rents.

That by the demand as of right and the payment as a duty for more than five years, this rate of $3.50 per acre has become a servitude on the defendants' land of toll or rental, within the definition of the statute; and that it has become established by prescription is fully supported by the case of

Whittenton Manufacturing Co. vs. *Staples*, 41 N. E. Rep., 441 (Mass. 1895).

That case, so far as this point was concerned, was a suit by the owner to collect one-fifth of the annual cost of maintaining a dam and drawing the water therefrom for the benefit of lower riparian premises, owned by another. The following extracts from the opinion will show the decision:

"No distinct agreement or stipulation being shown "calling for the payment of one-fifth of the cost of "maintaining the dam, we have to consider whether a "servitude has been imposed on the defendants' land "by prescription requiring such contribution * * "* * The one party collected the money as a "right; the other paid it as a duty."

Having shown that this continued for more than the length of time required to establish a prescription, in that State, the opinion continues:

"It would seem that the evidence is sufficient to es- "tablish such a servitude by prescription if in law such "a servitude can be so created."

And after discussing authorities:

"So, where a reservoir dam is maintained for the "benefit of several estates, the duty of repairs in whole, "or in a specified proportion, may be established by

" prescription as a charge against one of the estates in " interest. The duty of paying one-fifth of the reason- " able compensation for drawing water rests on the " same grounds."

" The right to take toll is called an easement."

Per Temple, C., in *Kellett* vs. *Clayton*, 99 Cal., 210, 212.

If this yearly rate of $3.50 per acre per annum has become a servitude on the defendants' lands by prescription, then, on well established principles, complainant's attempt to increase the burden was unlawful and the Court will not aid him (*Allen* vs. *San Jose Land & Water Co.*, 92 Cal., 138); unless, as he contends, the statute of 1885 empowers him so to do.

VI.

We are thus brought to the important matter of considering the bearing of the Art. XIV of the Constitution and of the Statute of 1885 upon this case.

As already suggested there is a well-founded dread on the part of many of the defendants, of the conception of the public control urged by complainant; and so there exists a tendency to rely upon the position that their relations to the company do not to any extent, not even in the control of maintenance rates, fall within the provision of the Art. 14, or of the statute.

The writer has hereinbefore urged the view, that by their contracts and under their vested rights, all of the defendants are absolved from rendering net revenue to the corporation; the obligation to pay the proper annual rate for maintenance, is conceded.

To what extent the matter of maintenance rates is

also by contract removed from public control, we shall leave to our associates to discuss; we shall also leave to them to present more fully their view as to how far the Art. 14 and the Statute of 1885 have no bearing on the case.

Complainant asserts that the whole matter of net revenue and maintenance is exclusively for public regulation; that no contracts can be made respecting easements in the water-works, which shall in any way affect rates; that the Statute of 1885 declares that there must be rates to comprehend both annual net revenue as well as annual maintenance; and that the parties concerned have no power to modify such supposed statutory scheme by contract.

We shall contend that if it be assumed that the whole matter of the relation of these defendants and the company, in respect of the water supply of water subject to appropriation, is subject to Art. XIV of the Constitution and to the statutes (Laws of 1862, 540; Civil Code, Sec. 552; Laws 1885, p. 96)—yet, the contract and property rights as asserted in the answer and as hereinbefore defined, are valid and maintainable in the courts.

There are two ways of looking at this provision of the Constitution and the statutes. The one regards them as disconnected from all that has gone before, as empirical, arbitrary; as striking out at a blow a novel order of things; as leaping into existence, new and complete in themselves, like Minerva out of the cleft skull of Jove.

There is another view, which cautiously interprets them by all that has gone before; which does not as-

sume that they were intended to overturn, disrupt and destroy the common conception of rights and institutions of property woven into the life of the people. Counsel for complainant contend for a construction of the former character; we contend for the latter. We adopt as a wise and salutary rule of interpretation the rule as stated in *People* vs. *Stephens*, 62 Cal., 233:

"Now these provisions, as well as the provisions of the Constitu-
" tion, must receive a practical, common sense construction. They
" must be considered with reference to the prior state of the law,
" and with reference to the mischief intended to be remedied by the
" change."

Rhode Island vs. *Massachusetts*, 12 Pet., 657, 723-4.
Slaughter House Cases, 16 Wall., 36.
Broder vs. *Water Co.*, 101 U. S., 276.
Lux vs. *Haggin*, 69 Cal., 442, 447-8, per Ross, J.

What then is the Public Use Declared by Art. XIV of the Constitution?

1. The phrase "public use" is employed in the Constitution with respect to waters open to "appropriation" as well as to others devoted to sale, rental or distribution; therefore it applies to the waters running on or through public lands of the State or of the United States, appropriated as shown by the answer.

Alta Land Co. vs. *Hancock*, 85 Cal., 219, 223.
City of Santa Cruz vs. *Enright*, 95 Cal., 105, 113.
Lux vs. *Haggin*, 69 Cal., 255, 426-8, 434.
Civil Code, 1422.

This being so, what constitutes an appropriation so far as this water supply is from the public lands is defined by

the Acts of Congress and Title VIII of the Civil Code and the decisions which construe them. The Constitution creates no new form, as, so far forth, it creates no new subject, of appropriation; as to such waters, it adopts the established signification of the term; it could not change the Acts of Congress; it has not assumed to change the law of the State in this respect.

2. But running waters on the public lands were open to the public to appropriate before the Constitution; they were, therefore, just as much a "public use" before, as since. So far as concerns this "public use," the Constitution is purely declaratory of the law as it was established before.

3. The law as established before, made it the one ruling, universal and indispensable condition to making a perfected appropriation, that the water must be *used for some useful or beneficial purpose.* Civil Code, 1411, which itself is declaratory.

There is nothing consummated, substantial or enduring in the whole conception except the *actual continued use.*

Everything else is but a means subordinate to this end. This is as true of the diverting and conducting works built by another for the use of the consumer, as it is of such works which the consumer builds for himself.

4. Irrigation of land in private ownership is a useful and beneficial purpose, within the law of appropriation.

It follows, that the appropriation of the use of water upon or from the public domain to irrigate land, in private ownership, involves the converting of what before was open to the "public use", into a *private one*, which thus becomes private property

and appurtenant to the land. This is the very meaning of "appropriate"—to set apart for one's self in exclusion of all others; to segregate from that which before was open to the public, a portion or the whole, to the use of the individual; and "as between appropriators, the first in time is the first in right." Sec. 1414, Civil Code, which is also merely declaratory.

What we contend is, that these essential ideas inherent in the nature of an appropriation for irrigation, to-wit: *the creation of private property rights to the use of water as appurtenant to land, with priorities*, survive the Constitution; and, that they survive it in the specific case where another than the land-owner, for business and profit, diverts the water and conducts it to the land. And more—that these essential elements of a complete appropriation of the right to the use of water, are the very things which the Constitution was intended to declare and lay up in the fundamental law against corporate monopoly or public interference.

How gross a perversion then, to interpret the Art. XIV as destroying the great central and beneficent ideas, which vitalize the appropriation of the use of water for irrigation, to-wit:

First. The acquisition of the right to such use as private property, appurtenant to the land irrigated; and as a necessary incident, the capacity to acquire, by fair contract, a property right in the diverting and conducting works, or in their service.

Second. The priority and protection of such rights against all who come afterward. This really follows as a necessary corollary to the conceptions of private property in the use of water for irrigation.

We contend that all the relations of the corporation in this case to the consumers of water for irrigating their lands, must necessarily be, and by the Constitution and statutes are to be, harmonized and co-ordinated with these primary and fundamental principles.

And we contend that under the Constitution and statutes, all public control and regulation of the use of water for irrigation must bow to these same imperative principles.

It will be convenient in the further discussion, following the example of Helm, J., in *Wheeler* vs. *Irrigation Co.*, 17 Pac. Rep., 487, 489, to use the term "carrier" and "consumers" meaning the corporation in what is assumed to be its *quasi-public* capacity, and the defendants as tillers of the soil, respectively.

We may further use for the purpose of designating the whole aggregation of rights involved in a perfected appropriation of the use of water for irrigation of land, comprising the right to the continued use of the water, with protected priorities, together with the property rights acquired in the works used for diverting and conducting the same, all made appurtenant to the land of the consumers, by the common and convenient term "water right."

"The right to the water or *water right*, as it is commonly called, " is only acquired by an actual appropriation and use of the water."

Nevada Company, etc. vs. *Kidd*, 37 Cal., 282, 310, per Sawyer, J.

VII.

Given the principle, that the consumer may in some lawful way acquire private property rights in the

use of water for irrigation, by appropriation ; that such rights may be made appurtenant to his land ; and that the Constitution and statutes have not destroyed, but confirmed, the institution of property comprehending such rights, in the case where the carrier intervenes to divert and conduct the water—then we contend, that it follows :

1. That the carrier is not in the true sense an appropriator of water. And that its diversion and carriage of the same, invests it with no title to, or property right in it, or its use, of which it can dispose.

That the consumer who has lawfully, through the agency of the carrier, applied the water to his land, is the only owner of a "water right". This results:

a. Because the Constitution expressly declares that notwithstanding any attempted appropriation for "sale, rental or distribution", the water shall nevertheless remain a public use and therefore open to appropriation, as it was before.

b. Because under the law of appropriation, the diverting and carriage of water for hire is not in itself "a useful or beneficial purpose", but only a means to that end.

That therefore the carrier has nothing which it can sell or rent, except an interest in or use of the property which it does own, to-wit : its diverting, storing and distributing system.

It would seem that the brief for complainant concedes that the carrier had no title or property right in the water or its use which it can sell or rent. On page 10 of the typewritten "points and authorities" of our opponents, in support of the exceptions, it is said : "The com-

" modity in which he deals is not his own, he is a mere " agent of the public in appropriating and delivering it." (lines 3. 4, 5). Again with respect to the value of the plant, it is said : "Is the water right of the company, or " the water stored by it to be considered? If so, how " can the value of the water rights, or the water, be as- " certained, and what is the interest of the company in " what the Constitution makes a public use?" (lines 15-18). We agree with counsel that water and water rights must be excluded from any valuation of the property of the company ; and the statute does exclude them ; for the sufficient reason that *as a mere carrier* it owns, and, under the Constitution, can own neither.

What then is the vital point of difference between us?

It is in the diverse conceptions of the public use declared by the Constitution. Instead of accepting that which we have endeavored to state, counsels' idea seems to be that the *public* appropriates the water, and that the carrier is the agent of the *public* in so doing. Counsel, as quoted above, uses the phrase "he is a mere " agent of the *public* in appropriating and delivering it." This is the Spanish conception and not the Anglo-Saxon.

Vernon I. Co. vs. *Los Angeles*, 106 Cal., 244 6.

The complainant, in argument, goes to the whole length of the theory that the water is owned by the public in its organized capacity ; that in this case, the public is represented by the county board ; and that the carrier is a purely and not merely a *quasi*-public agency for effecting the appropriation of water for such organized public; and to deliver it on its behalf to the units of that public ; and that as such purely public agency, it has the

delegated power to fix the rates from time to time, subject only to the appellate power of the board—to revise them or substitute others.

This is the precise result to which counsel came in the third paragraph of their Points (p. 2, lines 14-23).

It will be observed that this eliminates all volition on the part of the consumer; it ignores his capacity to acquire easements and servitudes as completely as though the attempt were to get an easement in or servitude upon a city water works, or a court house or a school house; it denies to him any right to contract; he has no voice of his own; on his side everything is delegated to the board.

Here is the storm center of the whole controversy over the construction of the Constitution and statutes. Both the carrier and consumers in this case have thus far regulated their relations entirely by contract. They have dealt with the subject in the way of their race, treating the whole matter as of private and not State initiation. The whole history shows this. All at once the carrier coolly ignores all contracts it has entered into and all grants it has made; repudiates all rights that have vested; and with the greatest naivete declares that it is all a matter of State regulation; and for the purposes of such regulation, for the time being, serenely announces, like Le Grand Monarque, "I am the State."

To this conception submission will never be made. If that had been, as counsel contends, and we deny, the legislative conception embodied in the Act of 1885, it will meet, at the hands of the Courts, the fate of the Statute of Uses, of which Sir Edward Sugden said: "This should operate as a lesson to the Legislature not

" vainly to oppose the current of general opinion, for al-
" though diverted for a time, it will ultimately regain its
" old channels " Gilbert Uses Introd., LXIII.

Or to use Mr. Washburn's language on the same subject, we shall have another " remarkable illustration of " the irresistible power of the common will of a people " to make for itself such amendments in the existing " laws as their necessities demand, independent of the " recognized system of legislation with which a State is " governed," 2 Wash. Real Prop., 93.

The whole history of the indigenous institution of the appropriation of water shows this.

We shall undertake to prove from decided cases under a Constitution which, like our own, declares the use of running water to be dedicated to the use of the people, that such a carrier acts as the agent of the *consumer* and *not* of the public in the appropriation and delivery of the water. This changes the whole face of the thing.

But before going to the decided cases, we recur to the record in this case, and ask what, in counsel's view, has become of the *water rights*, which the bill avers are *owned* by the respective defendants; and which the answer admits and avers are so *owned;* and what becomes of the averment in the bill that the defendants have " *by purchase* or *otherwise* " become such owners, which is also admitted in the answer?

In ordinary cases an ultimate fact alleged in the bill and admitted by the answer, establishes that fact for the purposes of the case. What does counsel ask the Court to do with *this* fact?

" Owner " in its general sense, means one who has full proprietorship in and dominion over property.

Directors F. I. District vs. *Abila*, 106 Cal., 355, 362-3.
Johnson vs. *Crookshank*, 21 Or., 339.

And by necessary implication the bill avers that such ownership was derived from the company by "purchase or otherwise;" and that this is the meaning of the averment, is shown by the acts and contracts of the company set forth in the answer.

If, as counsel concede, the water is not a commodity which the company owns; that it is a mere agent; and that as such agent, it has no interest upon which value can be predicated, "in what the Constitution makes a public use," to-wit, the water; then, what element in or constituent of the water rights does the bill allege to have been acquired by the defendants by "purchase or otherwise" from the company? Have the company and these defendants been under the influence of a huge delusion all these years, contracting, paying and receiving money, for so much moonshine?

To this complexion indeed comes the argument of counsel.

We differ; and, venture to believe that the more rational explanation is, that the company was selling, and if you please, giving away, servitudes upon its works; and that this element of the water right is the precise thing of which defendants have, by purchase or otherwise, become the owners, through their dealings with the company; the use of the water they get under the Constitution and the laws, on their own merits, by using it; and not from the company. To be sure, to be able to use it, they were compelled to employ the service of the storing and distributing system of the company.

Therefore that and that only was the subject of all the contracting with the company and of the ownership derived from it.

It has been decided under the Constitution of Colorado, by the courts of that State after repeated consideration, that such corporation is neither the appropriator of the water, nor the true and ultimate proprietor of the use of the water; that the true appropriator for irrigation is the consumer and he alone.

Sec. 5, Art. XVI of the Constitution of that State is as follows:

"Sec. 5. The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."

The Constitutions of the two States, Colorado and California, the one in the phrase, "dedicated to the use of the people," and the other in the words, "dedicated to a public use," announce one and the same principle.

Therefore, the decisions in Colorado, under this principle, in defining the *status* of the carrier, where the questions are not covered by the decisions of this State, are of very great authority, both from the great consideration which these questions have there received, and by reason of the high character of the Court.

The opinion in the case of *Wheeler* vs. *Irrigation Co.*, 17 Pac. Rep., 487, fairly broke the ground on this class of questions. We quote extracts. Speaking of the carrier, it holds that its "diversion ripens into a valid appropriation only when the water is utilized by the consumer." (pp. 488, 490).

Treating of the exceptional status of the carrier, it says of it :

"Certain peculiar rights are acquired in connection with the water "diverted. It is unnecessary now, however, to enumerate these "rights in detail; for the present it suffices to say that they are de- "pendent for their birth and continued existence upon the use made "by the consumer. But, giving these rights all due significance, I "cannot consent to the proposition that the carrier becomes a "'proprietor' of the water diverted." (p. 490.) "The carrier "must be regarded as an intermediate agency existing for the pur- "pose of aiding consumers in the exercise of their constitutional "rights as well as a private enterprise, prosecuted for the benefit of "the owner." (pp. 491-2)

The Court makes observations which are pertinent to the construction of the phrase "appropriated for sale, rental or distribution," in Art. XIV, and the phrases in the Statute of 1885, such as that in Sec. 5 in the words, "rates at which water shall be sold, rented "or distributed," etc., as follows :

"A cursory reading of the statute might convey the impression "that the legislature regarded the carrier as having a salable inter- "est in this water. And the constitutional phrase 'to be charged "for the use of water,' relating to the carrier's compensation might "at first glance seem to recognize a like ownership in such use. "But construing all the provisions of this instrument bearing upon "the subject *in pari materia*, the correctness of both these infer- "ences must be denied. The constitutional convention was legis- "lating with reference to the necessities and practical wants of the "people; and this body in its wisdom, ordained that the ownership "of water, shall remain in the public, with a perpetual right to its "use, free of charge, to the people. By Sec. 8, Art. 16, of the con- "stitution, from which the foregoing phrase is taken, the conven- "tion recognizes the carrier's right to compensation for transporting "water, but provides for the judicial or *quasi* judicial tribunal to fix "an equitable maximum charge where the parties fail to agree. It "requires no citation of authority to show that the words, 'pur- "chase' and 'sale' together with other words of like import, used "in this connection by the legislature, must receive a corresponding "interpretation."

In *Platte Water Co.* vs. *N. Col. Irri. Co.*, 21 Pac. Rep., 711, 712, the Court quoted with approval, this further extract from *Wheeler* vs. *Irrigation Co.*, *supra:*

"The diversion of the water ripens into a valid appropriation "only when the water is utilized by the consumer, though the pri- "ority of such appropriation may date, proper diligence having "been used, from the commencement of the canal or ditch."

As showing the personal or individual character of appropriation under such a constitutional provision we quote from *Reservoir Co.* vs. *Southworth*, 21 Pac. Rep., 1028, by Hayt, J., the following:

"In the light of these decisions, it seems clear that, at least under "some circumstances, different users of water, obtaining their sup- "ply through the same ditch, may have different priorities of right "to the water, that the appropriations do not necessarily relate to "the same time."

And from page 1029, *Ibid:*

"It is well established that no mere diversion of water from a "stream will constitute the constitutional appropriation. To make "it such it must be actually applied to the land before the appro- "priation is complete."

And after quoting from *Wheeler* vs. *Irrigation Co.*, *supra*, an extract above set forth, he continues:

"It is apparent from these decisions that the priority of appro- "priation which gives the better right is a legal conclusion, resulting "from certain facts; the diversion of water from the stream, and its "application to a beneficial use."

And per Elliott, J., in the same case (p. 1030):

"The appropriation of water within the meaning of the constitu- "tion, consists of two acts: *first*, diversion of the water from the "natural stream; and, *second*, the application thereof to beneficial "use. These two acts may be performed by the same or different "persons; but the appropriation is not complete until the two are "conjoined."

And further on the same page (1030):

"Can the carrier of water for hire be said to be using the water "in the sense spoken of in the constitution? * * From "the specification of the purposes for which water may be used it "would seem that the 'better right' which attaches to priority of ap- "propriation was primarily intended for the benefit of those who

"apply the water to the cultivation of the soil or other beneficial "use, rather than for the benefit of those engaged in diverting and "carrying it for the use of others. The diversion and carriage of "water, in point of time are necessarily prior to the application of it "to agriculture or other useful purposes; but they are subordinate "in point of right. The former are to the latter as the means to the "end, an end without which neither the diversion nor the carriage "would be lawful. The carrier is the agent, the consumer is the "principal. The former can lawfully pursue his occupation only by "virtue of the service he renders to the latter. The consumer's "right is primary, and unconditional; the carrier's is secondary and "dependent."

"Every consumer cannot take water directly from the natural "stream. Irrigating ditches and canals must be resorted to as a "means of diverting and carrying water to places where it can be "beneficially applied. *No good reason can be urged why a con-* "*sumer, obliged to make use of such agency, should not be protected* "*equally with those taking water directly from the stream.*"

The judge was here speaking with direct reference to priorities; but the principle is just as applicable to the protection of the consumer's capacity to acquire a fixed property interest in the water works of such agency, by way of servitude.

In answer to the spurious view of the "public use" declared by our Constitution, that it forbids priorities of right in the use of water, with the necessary incident of priority of right to the servitude upon the system; and that such declaration implies that a given water supply for irrigation of this public character, is dedicated to unending division and sub division, to continual adjustment and readjustment between earlier and later consumers as their demands and increasing numbers shall press upon the supply, we quote further from the opinion of Elliott, J, p. 1032, *Ibid:*

"A single illustration will suffice to show the disastrous conse- "quences which would ensue if the prorating statute should be "made the rule for the distribution of water for purposes of irriga- "tion, instead of the rule of priority. An irrigating ditch is con- "structed, the first and only one, taking water from a small natural "stream. The first year five consumers apply for and receive each

"one hundred inches of water for the irrigating of their lands; the "next year, the ditch being enlarged, five more apply and receive "a like quantity; and the third year five more; and so on succes- "sively until thirty or forty consumers are located under the ditch. "Perhaps the first five might be required to prorate with each other "in time of scarcity, should their appropriations be practically "equal in point of time; but under the statute, the first five would "also be compelled to prorate with all subsequent consumers, until "the amount of water that each would receive would become so in- "finitesimally small as to be of no practical value, and would event- "ually be entirely wasted before it could be applied."

What the effect would be on the orchard interests of Southern California, to inaugurate a system of perpetually dwindling water supplies, and maintain it under the Constitution by the strong arm of the law, requires no prophetic gifts to foresee.

We can indulge no fear of the possibility of a judicial reversal of the principle of exclusive appropriation to continued beneficial purposes of any water subject to the public use.

Helm, C. J., in the same case says (21 Pac. Rep. 1034):

"There is therefore no escape from the conclusion hitherto an- "nounced by this Court, that in cases like the present the carrier's "diversion from the natural stream must unite with the consumer's "use in order that there may be a complete appropriation within the "meaning of our fundamental law."

In *Combs* vs. *Agricultural Ditch Co.*, 28 Pac. Rep., 966, 968, there was an attempt to enforce a by-law of the ditch company, as follows:

"(1) No water shall be sold from the company's ditch, except to stockholders."

After holding that the company was not purely a mutual one, the opinion holds the language:

"The ownership of a prior right to the use of water is essentially "different from the ownership of stock in the irrigating company. "The ownership of stock, like the title to other property, may be

"acquired by descent or purchase. The ownership of the prior "right can be acquired originally only by the actual, beneficial use "of the water. The very birth and life of a prior right to the use of "water, is actual user. The stockholder in an irrigating company "who makes an actual application of water from the company's "ditch to beneficial use may, by means of such use, acquire a prior "right thereto; but his title to the stock without such use gives him "no title to the priority."

In *Fort Morgan Land and Canal Co.* vs. *S. Platte Ditch Co.*, 30 Pac. Rep., 1032, involving the rights of ditch companies, the syllabus by the Court contains the following:

"2. By a diversion and use for irrigation, a priority of right to "the use of the waters of the natural streams may be acquired. "This priority is a property right, and, as such, is subject to sale "and transfer.

"3. There must be not only a diversion of the water from the "stream, but actual application of it to the soil, to constitute the "appropriation for irrigation, recognized by the Constitution. A "diversion, unaccompanied by an application, gives no right."

Oppenlander vs. *Left-Hand Ditch Co.*, 31 Pac. Rep., 855-6.

The citation of this case is to the point that water rights for irrigation of land acquired by appropriators and consumers under an incorporated ditch company, by contract with it for an interest in the ditch, evidenced in the case cited by shares of stock, are such property that (*Ibid*, p. 857) "they may undoubtedly be "severed from the land, and may be sold and conveyed "separate and apart therefrom;" subject always to the condition that such an owner "can only transfer his "priority to some one who will continue the use of the "water." (*Combs* vs. *Ditch Co.*, 28 Pac. Rep., 966, 968); but the use may be a different one (*Kidd* vs. *Laird*, 15 Cal., 162; *Davis* vs. *Gale*, 32 Cal., 27; *Strickler* vs. *City of Colorado Springs*, 26 Pac. Rep., 314; *Ramelli*

vs. *Irish*, 96 Cal., 214, 217; *Jacob* vs. *Lorenz*, 98 Cal., 332, 340; Civil Code, Sec. 1412.)

The principle that the carrier of water, as such, by its diversion of the water and construction of its water works does not become the appropriator of the use of the water; acquires no proprietory right therein; and that the diversion ripens into a valid appropriation only when the water is utilized by the consumer, is further illustrated by the later decisions by the Colorado Court of Appeals.

Farmer's Ditch Co. vs. *Agl. Ditch Co.*, 32 Pac. Rep., 722.

Col. Land & Water Co. vs. *Rocky Ford, etc., Co.*, 34 Pac. Rep., 580, 583.

An attempt had, however, been made earlier by the majority of the Court of Appeals of that State to establish the contrary doctrine, to-wit: That under such circumstances the company became the owner of the water as a commodity to be sold by it, by an elaborate opinion in *Wyatt* vs. *Larimer & Weld Irrigation Co.*, 29 Pac. Rep., 906, in which a rehearing was denied.

This case was thereupon appealed to the Supreme Court of that State and its original opinion and opinion on rehearing are reported in the 33 Pac. Rep., 144. The Court say (p. 147) upon this subject:

"We adhere to the doctrine that such a canal company is not the "proprietor of the water diverted by it, but that it must be consid- "ered as an intermediate agency existing for the purpose of "aiding consumers in the exercise of their constitutional rights, as "well as a private enterprise prosecuted for the benefit of its "owners."

These Colorado decisions have but carried to the logical conclusion in cases touching the status of cor-

porations engaged in the carriage of water, the doctrines which have always prevailed in the courts of this State, that "the property is not in the *corpus* of the water, but only in its use."

N. C. & S. S. Co. vs. *Kidd*, 37 Cal., 282, 310, Per Sawyer, C. J.
Eddy vs. *Simpson*, 3 Cal., 249, 252.
Kidd vs. *Laird*, 15 Cal., 179, 180.
Davis vs. *Gale*, 32 Cal., 27, 34, per Sanderson, C. J.

VIII.

We have thus, at perhaps undue length, cited decisions to show, what opposing counsel seem to admit, that the corporation has no title to the water diverted; has no water to sell; and must be considered as an intermediate agency to aid consumers in the exercise of their constitutional rights, to appropriate the water to irrigate their lands, as well as a private enterprise of its owners.

We have done so, to show that the premises just stated are established beyond question.

For it follows from them with unerring certainty, that if the carrier may make a contract of sale or rental with the consumer at all, the subject of such contract is not the water; and must therefore be some interest in the water works. And since all concede that by any such sale or rental of some interest in the works the title of the carrier is not divested; and that the consumer only acquires the right to connect them with his land, enjoy their service in delivering the water which he is thus enabled to appropriate; it also follows that

the interest in the works which can be thus *sold* is a freehold servitude; and, which can thus be *rented* is a leasehold servitude.

It is next to be inquired whether the consumer as principal may make such contracts with the carrier as his agent; whether the fact that the carrier is "affected with a public interest," destroys its capacity to contract as a private corporation.

This question was touched upon in *Wheeler* vs. *N. Col. Irrigation Co.*, (1888) 17 Pac. Rep., 487, 493; in *Farmer's, etc., Canal Co.* vs. *Southworth*, 21 Pac. Rep., 1028, 1031; wherein it was assumed that there might be "contractual relations;" but only emerged in clear decision in *Wyatt* vs. *Larimer & Weld Irrigation Co.*, 33 Pac. Rep., 144.

In Wheeler case, *supra*, the question was whether as a condition precedent to granting the use of water to a would-be consumer, the carrier could compel him to sign a contract "That he buy in advance 'the right to "receive and use water' from its canal, paying therefor "the sum of $10.00 per acre" (p. 491).

The similarity between the question in that case and the case of *San Diego Land & Town Co.* vs. *National City*, recently decided by this Court on the question of the right to exact the price of a "water right" is striking. The Colorado case holds as this Court did, that such exaction is illegal and unconstitutional. And to the same effect is the holding as to an exaction attempted to be made for the price of a "water right" in *Combs* vs. *Ditch Co.*, 28 Pac. Rep., 966; in another form, *i. e.*, by a by-law requiring the purchase of stock

in the corporation as a condition precedent to the service of the ditch.

In the case of Wheeler, Helm, J., however, by way of precaution said:

> "I must not be understood as intimating that this demand is "illegal *per se;* and if the consumer, prior to 1887, saw fit to waive "his right, by voluntarily submitting thereto, both the legislature "and courts may be alike powerless to relieve him from the legiti- "mate results of his contract."

So the Combs case must not be considered as holding the provision in the by-law for sale of stock to the consumer as illegal except, as put by Justice Elliott, p. 967, when used for "*compelling* the purchase of stock "as a condition precedent to use" of the water; for the same Court, in *Oppenlander* vs. *Ditch Co.*, 31 Pac. Rep., 854, while citing and relying on the Combs case, held (p. 857) that the severance, sale and conveyance of a water right, under a ditch company, appurtenant to land, may take place "by the assignment and sale "of stock representing water rights in an incorporated "ditch company."

But finally in the Wyatt case (33 Pac. Rep., 144) the Court clearly holds that a consumer for irrigation of land under a carrier of this *quasi*-public character, may, by contract with such corporation acquire a freehold servitude in the ditch annexed as an easement to his land.

The object of the plaintiffs in that case suing for themselves and all other users of water except the defendant company, who obtained their supply from the canal of the company by virtue of the water right contracts issued by the company, was to enjoin the company from selling additional water rights, or entering into further water

right contracts, providing for prorating of the water flowing in its canal. In order to give jurisdiction to the Supreme Court, it was necessary to decide whether the interests of the plaintiffs in the canal were freehold estates. We quote the following extracts from the opinion: (p. 147.)

"The right to the relief demanded in this action is predicated "upon, and must be determined by, the terms of the contracts en- "tered into by the respective parties; and, while those contractual "rights are analogous to the rights guaranteed by the Constitution "to appropriators of water, the action involves only the considera- "tion of private contracts between the ditch company and the "plaintiffs, and no constitutional question is involved in the decision "of the case. The jurisdiction of this Court by appeal, therefore, "depends solely upon the question whether the action relates to the "freehold. * * * It is therefore necessary to ascertain "and define the nature and kind of property claimed by plaintiffs "in the water rights in question, and whether the nature and extent "of their interests therein constitute freehold estates, and whether "this action relates thereto. * * *

"The plaintiffs allege a right to have a certain quantity of water "flow through the irrigation company's ditch. This right is an "easement in the ditch. It is a right annexed to realty, and being "a perpetual right is an incorporated hereditament, descendible by "inheritance to plaintiffs' heirs, and hence a freehold estate." *

After holding that the canal company is not a proprietor of the water, in the passage hereinbefore quoted (p. 38) from the same opinion, the following passages occur:

"The status of the defendant company could in no aspect affect "these rights. Its duty to these plaintiffs would be the same "whether that duty was to furnish water under their contracts as "proprietor *or carrier* of water * * *

"The company is the owner of the canal whereby it proposes to "divert water from the Cache la Poudre river for the use of the "farmers owning land capable of being irrigated therefrom."

The Court reached the conclusion "that appellants "have certain well defined rights that will be mater- "ially impaired if defendants do the act threatened." And held that the cause was clearly cognizable by the

Court of Equity. In the opinion on rehearing, the Court adhered to its judgment and in the course of its opinion, after defining and citing authorities defining an easement, said:

"The right to acquire water by an appropriator under our system "is of the same character as that defined by the foregoing authori- "ties as an incorporeal hereditament and easement. *The consumer* "*under the ditch possesses a like property.* He is an appropriator "from the natural stream, through the intermediate agency of the "ditch, and has a right to have the quantity of water so appropriated "flow in the natural stream, and through the ditch for his use."

Thus the Colorado Court under a constitutional declaration like our own, reasoning from the principles of the common law defining easements and servitudes, reaches the same result as declared by Section 552 of our Civil Code.

And it is to be remembered that this section of the Code co-existed with the Statute of 1862, page 540, which contained the provision that the rates, water rents or tolls established by corporations from under that act, should be "subject to regulation by the board "of supervisors of the county or counties in which the "work is situated, but which shall not be reduced by "the supervisors so low as to yield to the stockholders "less than 1½ per cent. per month upon the capital "actually invested;" so that it is impossible to say that in the legislative intent up to the time when the Constitution was adopted and the Act of 1885 passed, the subjecting of water rates to regulation by the board of supervisors was inconsistent with the acquisition of such easements appurtenant to land as are defined in Sec. 552 of the Civil Code. We are next to inquire whether the Constitution and the Act of 1885 has su-

perseded the Sec. 552, or whether they stand consistently together.

IX.

And in this connection and before taking up the Act of 1885, we take occasion to advert to the assumption made in the oral argument in behalf of complainant, that the decision of this Court in the National City case, against the complainant's *theory* of a water right there advanced, was fatal to the claims of these defendants to their water rights in this case. This assumption was seized upon as furnishing judicial sanction for the repudiation by the company of all the contract rights of these defendants, a repudiation which, however convenient to complainant for the immediate purposes of this case, would cut out the foundation from under all future business and prosperity of the company.

To probe this assumption, it is necessary to dissect the theory of water rights put forth in the National City case.

In the first place, the company there claimed that because there was not water enough for all the land, it had *priorities in the use of water to sell;* that such priorities were *its* property; and that to compel it to begin to furnish water to irrigate land, operated under the Sec. 552, to annex an easement to the land, for which it was entitled to demand pay *over and above annual rates*, though these rates in fact and in legal contemplation yielded both the reasonable operating and maintenance expenses, *and* all such compensation on the money invested in the purchase and construction of the

works as it was entitled to by law.

The same conception is advanced in this case, as shown by the construction which was put upon the formal contracts shown in the answer, at the oral argument and is now put by the points filed for the receiver. Take the case of "water right" sold by the company in connection with its land (pp. 15, 16, answer); by the terms of the contract the corporation "agrees to sell unto the " party of the second part, and the party of the second " part agrees to purchase of the party of the first part " the following real estate, to-wit :" (description) "*to-* " *gether with a water right to one acre foot of water per* " *annum* for each and every acre of said above described " real estate, to be delivered by the party of the first " part through its pipes and flumes at a point..... .. " said water to be used exclusively, on said real estate, " and to become and be appurtenant thereto, and not to " be diverted therefrom. Provided that the party of " the first part may change the place of delivery of said " water so long as the same is near the highest point " of said land. *For which land and water right* the " party of the second part agrees *to pay*..... " *Dollars.*

"And the party of the second part further agrees " and binds himself.....to pay the regular annual " water rates allowed by law and charged by the party " of the first part for *the water covered by said water* " *right.*"

The contract is substantially the same so far as the sale of the water right is concerned, where made with those who did not buy land from the company; but in those cases the price of the water right is specifically

fixed, earlier at $50 and later at $100 per acre (Answer pp. 17, 18).

Now counsel claim that *under those contracts* the annual rates must be commensurate with "the cost per "annum of operating the plant, including interest paid "upon money borrowed, 'to make good' the annual de- "preciation of the plant," *and* "a fair profit to the com- "pany either by way of interest on the money it has "expended or upon some other fair and equitable "basis." (Page 8 of Points par. 11) In short, counsel deliberately claim, that notwithstanding the company has sold and taken pay for "water rights" that that part of the contract has no effect on the "rates allowed by law," which must cover both maintenance and operation, *and* net revenue not less than 6 nor more than 18 per cent. per annum on the cost of the plant.

Under this conception what did the company sell and what did the consumer receive in consideration of his $50 or $100, or what not higher sum, per acre covered up in the price of land *and* water right at $300 to $500 per acre? If notwithstanding such payment in advance, the consumer must pay in annual rates all the carrier could in any event collect for annual reasonable expenses in repairs, management and operation of its works and also for net revenue and profits on the cost thereof, what is the nature of the demand for the price of a "water right"? Truly, as this Court held in the National City case, it is without basis; for if paid it must have a bearing on the annual rates; and a theory which denies that it has such bearing, and still claims the right to enforce the demand, insists upon pure ex-

tortion from the consumer of so much money as a condition precedent to his exercise of his constitutional rights. This *theory* of the company and receiver it was which made shipwreck on the constitutional rock and broke into smithereens under the decision of this court.

But we are confronted here by "a condition and not a theory." The question is, whether the complainant after having pocketed the money is at liberty to put forth, in order to gain a short-sighted advantage, a construction upon these contracts which would make them unconstitutional. We submit not, if any other construction is to be found. Such construction is to be found in giving to the contracts their natural meaning, as being grants of freehold servitudes on the system for a price paid; and in holding that the bearing of this upon the "annual water rates allowed by law" is that it eliminates from them the whole element of net revenue; this is the principle of the classification of lands by the company and Receiver made as set forth in the answer (pp. 19, 20); and that rule of classification is what every consumer believed, and had a right to believe was the principle which has regulated these rates from the beginning.

We quote from *Wyatt* vs. *Larimer & Weld Irrigation Co.*, 33 Pac. Rep., 144, 149, the following pertinent extracts:

"If the terms of a contract admit of two meanings, one of which "would render the contract unlawful, and the other lawful, the lat-"ter construction must be adopted. Doubtful words and provisions "are to be taken most strongly against the grantor, he being sup-"posed to select the words which are used in the instrument."

And the following from *Noonan* vs. *Bradley*, 9 Wall., 395:

"Where doubt exists as to the construction of an instrument pre-
"pared by one party, upon the faith of which the other party has
"incurred obligations, or parted with his property, that construction
"should be adopted which will be favorable to the latter party; and
"where an instrument is susceptible of two constructions * *
" * the one working injustice, and the other consistent with
"the right of the case * * * that one should be fav-
"ored which upholds the right."

The acts of the company in relation to these contracts are persuasive, if not of controlling weight, in their interpretation.

And the Court further quotes the following from the case of *Chicago* vs. *Sheldon*, 9 Wall., 54:

"In cases where the language used by the parties to the contract
"is indefinite or ambiguous, and hence of doubtful construction,
"the practical interpretation by the parties themselves is entitled to
"great, if not controlling, influence."

And we may say, as the Court did in the Wyatt case, that in whatever aspect these contracts are considered, whether upon the plain import of the language used, or by regarding certain terms as of doubtful meaning, their interpretation must be favorable to the contention of these defendants.

The contracts created the titles to the servitudes; these became fixed and vested rights. The principle governing the annual rates adjusts them to those rights; and that principle dictates that they should be confined to the annual expenses of operation and maintenance, and should exclude net revenue.

X.

The Act of 1885.

By Art. 14 of the Constitution, the regulation and control reserved to the State over rates or compensa-

tion for use of water supplied to the inhabitants of any county outside of any municipality is left to be exercised under the authority of and in the manner prescribed by law, *i. e.*, statute law.

We are to look then to the statutes as they stand for the rule of decision; and these are Sec. 552 of the Civil Code and the Act of 1885; the Act of 1862 is impliedly superseded by the Act of 1885, though it has not, we believe, been in terms repealed.

The Statute of 1885 on its face, assumes that the carrier and consumer have voluntarily established for themselves and without the intervention of any public authority, relations to each other, in which somehow certain water "rates" have become established (last sentence of Sec. 5). These rates are further described as being "actual" and "collected". So far forth the statute institutes nothing; it simply describes a situation; a situation common to this semi-arid region, where the legislature has noticed, and the courts will take judicial notice, that by the co-operation of the corporations and the settlers, deserts have, in a decade or less, been converted into thickly settled communities.

These communities are not penal colonies seated on these arid tracts under compulsion of law, and by law compelled to take land and water supply at rates dictated by the State. They came induced by the representations of enterprising capitalists who had developed irrigating schemes, almost universally in connection with schemes for the sale of land so irrigated.

The present cause is in its facts, an excellent illustration of the conditions which the legislature had in view in passing the Act of 1885, and has been described

with great accuracy by this Court in the National City case.

It is sufficient here to say that the whole history is one of contract; of offers by the corporation of land with water at certain prices in lump sum, and at a certain annual water rate thereafter, accepted by the settler; of offers of water supply at the certain annual rate accepted by those who did not purchase land; later, of formal contracts conveying land and water rights, and water rights without land, in which figure prices paid in gross for the "water rights", with provision for an annual rate besides. This legislation is adapted, fitted, to this state of things; it is not intended to overthrow it, but to supplement it, by providing means for correcting any abuses and for meeting certain exigencies, and enforcing justice and equity between all parties, which it would be impossible to do if the contract rights were disregarded.

It is then the simple historical fact that "the actual "rates established and collected by each of the * "* * corporations now furnishing, or that "shall hereafter furnish appropriated waters for sale, "rental or distribution to the inhabitants of any of the "counties of this State" were so established by *contract* between the carrier and consumer; and that the law (Sec. 5) so regards them. And the important consequence follows, that when the law declares that such "actual rates established and collected * * "* shall be deemed and accepted as the legally estab- "lished rates thereof;" the statute simply adopts and confirms the contract relation and converts it into a legal *status*. It is a *status* that must remain undis-

turbed by carrier or consumer, until rates shall be established by the board of supervisors as provided in the Act; and then it can only be revised as to existing consumers with due regard to their vested rights, as well as to the vested rights of the company. To that *status* the rates must return when the rates so established by the board "shall have been abrogated by such board of "supervisors"; so fundamental is this contract *status.*

We do not mean to be understood as claiming that the right to maintain the annual rate established, so far as it relates to mere maintenance and operation, stands on the same footing as being a vested right, as the title to the servitudes. For it is clear that the recurring expenses for current and future maintenance and operation are a common charge to all consumers, the company included; that it may vary; that each consumer has the right to have every other consumer bear his just apportionment thereof, and is under the reciprocal obligation; and that on principle the carrier is not required to expend more in this behalf than it receives. It may be, and probably is true, that this is a matter of such public concern as to be always the subject of the jurisdiction of the board of supervisors when properly called into exercise. What we do assert is, that this is no argument against vested rights in the servitudes.

The statute puts no limitations upon the rights of the carrier and consumer to contract. But when appeal is made to the board there must necessarily be some statutory recognition of the subjects for which rates may be established. We submit that the statute specifically recognizes and provides for fixing rates for

freehold and leasehold servitudes. The first clause of Sec. 5 of the Act of 1885, especially when construed together with Sec. 552 of the Civil Code clearly manifests this. The language is as follows:

"Sec. 5. In the regulation and control of such water rates for "each of such * * * corporations, such board of super- "visors may establish *different* rates at which water may and shall "be *sold*, *rented* or distributed, as the case may be."

We are not here concerned with such occasional, fluctuating and miscellaneous uses of water as are grouped under the head of "distributed"; and dismiss that with the remark that, though the measure of compensation for revenue as well as maintenance were regulated—*e. g.*, by the gallon delivered, still the principle that it is not the water that is sold but the service of the works which is furnished and paid for, remains.

But we are concerned here with those permanent irrigating rights termed easements by Sec. 552; therefor with the terms "sold" and "rented" as used in Sec. 5. We have hereinbefore at length commented on the constitutional reason why these words cannot be taken to mean that the corporation either sells or rents the water itself, since its use is declared to be a "public use". We now point out that neither are these terms used here in the sense of sale or rental of the water as a commodity,

The water used for irrigation is consumed in the use. This is equally true of water whether it is spoken of (mistakenly) as "sold" or "rented". If one gets a year's water supply for his ten acre tract, he uses just as much and consumes it just as absolutely, whether it be said to be sold or rented.

Now, if the water is rented and consumed in the renting, where is the reversion in the water to the lessor—that reversion which is always the incident of a lease?

Again, the statute expressly contemplates different rates at which the water may and shall be "sold" or "rented" as the case may be. But if the same amount of water is used for a given purpose and is absolutely consumed in the use, whether it is said to be sold or rented, why fix different prices on precisely the same thing, simply because in the one case it is said to be sold and in the other rented? This construction of these words is plainly absurd.

The terms "sold" or "rented" refer to the property of the corporation, to-wit, the works; and since it retains the title and contracts for the service of the works, it is the easement in and servitude upon them that is the subject of sale or rental, as the case may be, as indeed is declared by Sec. 552.

So that even after the board acts, we do not get away from contract. For how can there be a sale or rental even after the maximum rates are fixed without a contract; especially when, as decided in the Wheeler case, the parties are at liberty to contract for any rates within the maximum (17 Pac. Rep., 492)?

That all such contracts do not interfere with proper police regulation, see *White* vs. *Reservoir Co.*, 43 Pac. Rep., 1028.

As shown by the cases of Wheeler and Combs, *supra*, the statute always extends to the consumer the right to have a leasehold servitude, if for any reason he does not desire to purchase a servitude in

freehold. In this respect also the rule ten adopted by the corporation and its receiver, above referred to, is sound in principle.

If in acquiring these vested contract rights, which in this case are servitudes, the consumer paid too much, he cannot be heard to complain; the only fact with which the Court is concerned, is that he acquired them. If the corporation sold them too cheaply, or gave them away, that fact is, in the judicial view, also immaterial; the inquiry does not extend beyond the fact that servitudes were granted.

The view of our friends on the opposite side on the vital question in the case, whether the corporation can disregard all vested rights and the existing *status*, are briefly stated in number IV of their points as follows:

"The rates fixed by the company are *changeable* by "it the same as by the board of supervisors. This is "not expressly provided for by the statute, but the "whole tenor of the statute indicates it and the neces- "sity of changing the rates to meet new conditions and "circumstances, is necessary for the protection of both "company and its consumers."

Everything which has thus far been said in this brief centers in a focus upon this single proposition, *whether the company has the legal authority to change its rates as to existing consumers at its own discretion.* We say existing consumers, for the rights of no others are before the Court.

The fifth exception, after alluding to the fact that it appears from the answer that complainant has attempted to jump the rate from $3.50 per acre per annum, as

actually established and collected, to $7.00, avers:

"That the defendants have no standing in this "Court to contest the reasonableness of said rates, but "their remedy, if any they have, is to apply to the "board of supervisors of the county in which their said "land is situated to fix and establish said rates."

Counsel notwithstanding the prayer of their bill, manifest a doubt whether the Court here will exercise a jurisdiction to "inquire into the reasonableness of "rates fixed by the company" (Points No. VI). And at the close of the brief they say, "either the company "or the receiver could bring all the defendants before "the Court, in one suit, *to settle the question of its right* "to establish the rate now in controversy."

If the *reasonableness* of this rate is not a question on which the defendants can be heard, then neither can the complainant. All this appears to be a roundabout way of conceding that the real and ultimate question for decision here, if there is jurisdiction of the subject matter, is whether the complainant had the *naked power* to jump the established rate.

We submit that the fundamental weakness of the complainant's case is that it has no such power. We have already submitted the view that it has no such power upon any view, legal or equitable, aside from the statute.

We now assert that not only is there no affirmative support for this power in the statute; but that it expressly prohibits the exercise of such power both in terms, and by its whole tenor.

Let us suppose that the receiver were to bring a suit at law to recover water rentals unpaid since January 1,

1896, at the rate of $7.00 per acre. If he were to follow the Statute, he must aver that "$7.00 per acre per an-" num is the *actual rate established and collected.*" Under the facts stated in the answer or in the bill, could this be proved? Was $7.00 ever a rate in actual practice? Not at all, it is only proposed.

Has it been a rate collected? Never. The whole burden of the bill of complaint is that the Receiver has not been able to collect the proposed rate, and fears he never will, unless the Court aid him by its judgment and injunction.

Again the statute in terms gives to the consumers, or would-be consumers, provided as many as 25 unite, the privilege in the first instance, exclusive of the carrier, to apply to the board to establish the rate. But of what earthly avail is the exclusive feature of this remedy, if the corporation can get before the board whenever it sees fit, by the simple device of demanding any rate it chooses; and of thereupon inaugurating a water famine, as it has here, for the evident purpose of driving consumers to the board for relief?

The plain meaning and intent of the statute is that when the corporation has drawn in settlers from all quarters of the world, by its promises, representations and contracts as by a net, and has induced them to settle under its system under all the varied circumstances, as in this case, it shall not treat them as captive feudatories under its arbitrary rule as the over-lord. If the statute does not mean this, then there is no such thing as any rate *established* by the corporation; for it is only the sovereign who has power to change a rule that has been established; and even the sovereign in so do-

ing must respect contract rights. If the corporation can at its discretion double the water rates, it is a mockery for the statute to call them "established."

So we submit that the rates fixed by the company are *not* "changeable by it the same as by the Board of Supervisors," as our brethren contend; but that notwithstanding such attempted change, the actual rate hitherto established and collected at $3.50 per acre per annum, must continue to be "deemed and accepted as the legally established rate." And this might well end the discussion.

Miscellaneous Considerations.

But counsel say (Point III) that "the only protec-" tion of the company is its right to fix its own rates"; that is true in the sense, and only in the sense, that when it initiates its scheme it establishes the rate, and has every opportuntity to protect itself in so doing. It was possessed of all the information upon which to base the rate; the people whom it attracted had none, but accepted the company's own terms. Therefore the corporation has had its inning on the rate business. The statute declares in effect that its power in this direction is *functus officio*. The next inning is for the consumers, but under severe restrictions and conditions; and that inning is simply to apply to a *quasi*-judicial body, where the carrier is heard as well as the consumer, and where the hearing is of such a character that the carrier has every advantage; for it is self-evident that a range of permitted award of net revenue anywhere between *six*

and *eighteen* per cent., has possibilities for reducing the tiller of the soil to the condition of the Egyptian fellahin, which it is not agreeable for him to contemplate.

There is another demand, a cause of great vexation to the defendants, which this receiver has coupled with his demand for increased rates and has attempted to make a condition to further water supply after January 1, 1896, to-wit: the demand that they one and all must enter into a contract containing the terms set forth on pp. 33-35 of the answer. The company and the receiver insist on the execution of this contract under the guise of a police regulation. But, as apparent on its face, it is much more; for it is an attempt to compel the defendants to surrender the title to their servitudes and also to give the company or its receiver what amounts to a power of attorney to change the rates to take effect at the close of any year.

The inconsistency of the receiver's course in shutting off the water because defendants would not sign these *contracts*, and his coming before the Court now to be sustained in his acts on the ground that there is no power in carrier or consumer to contract, invites severe comment, but we forbear. But we would that the Court might correct this abuse.

On the question of jurisdiction in respect of the amount involved we merely cite, as in duty bound, the case of *Fishback* vs. *Western Union Tel. Co.*, Supreme Court, Mar. 2, 1896; and we express the hope that the jurisdiction may be maintained; for the community and company as well, need to have the questions raised in this case settled.

Without taking up the exceptions further in detail, we submit that all those touching the merits, should be overruled.

1st. Because the actual irrigation rate established and collected by the company is $3.50 per acre per annum, and that this is the only rate to be deemed and accepted as the legally established rate.

2nd. That neither the company nor its receiver have any power to increase these rates without the consent of the consumers.

3d. That the demand upon the defendants for the execution of the contracts contained in the so-called application for water demanded as a condition to further water supply, is an unlawful attempt to interfere with their constitutional and statutory rights and the rights vested in them under their contracts.

4th. That each of the defendants is the owner of a water right, a constituent part of which is a freehold servitude on the Company's water-system.

5th. That if the case presents any question of the reasonable rate, then that the rate of $3.50 per acre per annum is reasonably and amply sufficient. That substantially the same rate has been maintained by this Court in the National City case under the same state of facts, except that in this case, the defendants show the important additional element in their favor of servitudes on the system *owned* by them.

And, in conclusion, the defendants most respectfully submit that they are not conscious of having invaded any right of the company or its receiver; that they are brought here not upon their own volition; and that therefore they are persuaded that in good conscience

and lifting up clean hands they may make to this Court of Equity their prayer, "Let us have peace."

HAINES & WARD,
Of Counsel for Defendants.

NOTE.—Since the foregoing was written, there has come to our attention the important case of *Merrill* vs. *Southside Irrigation Co.*, decided April 15, 1896, by the Supreme Court of this State. That case holds that Section 552 of the Civil Code is in full force. It therefore affirms that the perpetual easement, and what is the same thing, the right to the continued use of the water, as provided for in that section, may be created under the Constitution.